

AMENDED IN ASSEMBLY JUNE 28, 2002

AMENDED IN SENATE APRIL 9, 2002

AMENDED IN SENATE APRIL 1, 2002

SENATE BILL

No. 1575

Introduced by Senator Sher

February 20, 2002

An act to amend Section 21351 of the Probate Code, relating to wills and trusts.

LEGISLATIVE COUNSEL'S DIGEST

SB 1575, as amended, Sher. Wills and trusts: prohibited transferees: exceptions.

Existing law, with specified exceptions, invalidates a donative transfer to the person who drafted the instrument, or to a person who is related by blood or marriage to, is a cohabitant with, or an employee of, the drafter, among others. Existing law excepts from these provisions a transfer where the transferor is related by blood or marriage to, or is a cohabitant with, the transferee or the person who drafted the instrument. Existing law also excepts transfers where the instrument is reviewed by an independent attorney, as specified, and provides a form of certificate for this purpose, and excepts a transfer that is approved by a court, as specified, among others.

This bill would include within the above-described exceptions domestic partners, as specified, and ~~any person who is a cohabitant with the transferor~~ *would define cohabitant for these purposes*. The bill would require an independent attorney making a review of an instrument to be excepted from the provisions described above to attempt to determine if the intended transfer is the result of fraud,

menace, duress, or undue influence, and would revise the certificate the attorney is required to deliver to the transferor, with a copy delivered to the drafter, in order to document his or her review. The bill would delete the exclusion of evidence of certain interested parties, as specified, from a court determination of whether a transfer was a product of fraud, menace, duress, or undue influence. The bill would revise the definition of related by blood or marriage for the purpose of the above-described exceptions. The bill would create new exceptions for any transfer that does not exceed \$3,000, except as specified, and for any transfer made by an instrument executed by a nonresident of California who was not a resident at the time the instrument was executed, and that was not signed in California.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 21351 of the Probate Code is amended
2 to read:

3 21351. Section 21350 does not apply if any of the following
4 conditions are met:

5 (a) ~~(1) The transferor is related by blood or marriage to the~~
6 ~~transferee or the person who drafted the instrument.~~

7 ~~(2) The transferor is the registered domestic partner, pursuant~~
8 ~~to Division 2.5 (commencing with Section 297) of the Family~~
9 ~~Code, of the transferee or the person who drafted the instrument.~~

10 ~~(3) The transferor is a cohabitant with the transferee.~~

11 ~~(4) The transferor is related by blood or marriage to, is a~~
12 ~~cohabitant with, or is the registered domestic partner, pursuant to~~
13 ~~Division 2.5 (commencing with Section 297) of the Family Code,~~
14 ~~of the transferee or the person who drafted the instrument. For~~
15 ~~purposes of this section, "cohabitant" has the meaning set forth~~
16 ~~in Section 13700 of the Penal Code. This subdivision shall~~
17 ~~retroactively apply to an instrument that becomes irrevocable on~~
18 ~~or after July 1, 1993.~~

19 (b) The instrument is reviewed by an independent attorney who
20 (1) counsels the client (transferor) about the nature and
21 consequences of the intended transfer, (2) attempts to determine
22 if the intended consequence is the result of fraud, menace, duress,
23 or undue influence, and (3) signs and delivers to the transferor an

original certificate in substantially the following form, with a copy delivered to the drafter:

“CERTIFICATE OF INDEPENDENT REVIEW

I, _____, have reviewed
 (attorney’s name)
 _____ and counseled my client,
 (name of instrument)
 _____, on the nature and consequences of the transfer, or
 (name of client)
 transfers, of property to _____
 (name of potentially disqualified person)

contained in the instrument. I am so disassociated from the interest of the transferee as to be in a position to advise my client independently, impartially, and confidentially as to the consequences of the transfer. On the basis of this counsel, I conclude that the transfer, or transfers, in the instrument that otherwise might be invalid under Section 21350 of the Probate Code are valid because the transfer, or transfers, are not the product of fraud, menace, duress, or undue influence.

 (Name of Attorney) (Date)”

Any attorney whose written engagement signed by the client is expressly limited solely to the preparation of a certificate under this subdivision, including the prior counseling, shall not be considered to otherwise represent the client.

(c) After full disclosure of the relationships of the persons involved, the instrument is approved pursuant to an order under Article 10 (commencing with Section 2580) of Chapter 6 of Part 4 of Division 4.

(d) The court determines, upon clear and convincing evidence, but not based solely upon the testimony of any person described in subdivision (a) of Section 21350, that the transfer was not the product of fraud, menace, duress, or undue influence. If the court finds that the transfer was the product of fraud, menace, duress, or undue influence, the disqualified person shall bear all costs of the proceeding, including reasonable attorney’s fees.

1 (e) Subdivision (d) shall apply only to the following
2 instruments:

3 (1) Any instrument other than one making a transfer to a person
4 described in paragraph (1) of subdivision (a) of Section 21350.

5 (2) Any instrument executed on or before July 1, 1993, by a
6 person who was a resident of this state at the time the instrument
7 was executed.

8 (3) Any instrument executed by a resident of California who
9 was not a resident at the time the instrument was executed.

10 (f) The transferee is a federal, state, or local public entity, an
11 entity that qualifies for an exemption from taxation under Section
12 501(c)(3) or 501(c)(19) of the Internal Revenue Code, or a trust
13 holding an interest for this entity, but only to the extent of the
14 interest of the entity, or the trustee of this trust. This subdivision
15 shall retroactively apply to an instrument that becomes irrevocable
16 on or after July 1, 1993.

17 (g) For purposes of this section, “related by blood or marriage”
18 shall include persons within the fifth degree or heirs of the
19 transferor.

20 (h) The transfer does not exceed the sum of three thousand
21 dollars (\$3,000). This subdivision shall not apply if the total value
22 of the property in the estate of the transferor does not exceed the
23 amount prescribed in Section 13100.

24 (i) The transfer is made by an instrument executed by a
25 nonresident of California who was not a resident at the time the
26 instrument was executed, and that was not signed within
27 California.

